

Evidence or political will? DEA, Hargreaves and the future of UK copyright regulation

Having launched a **policy brief** in March criticizing the Digital Economy Act (DEA) in relation to copyright and file-sharing and with Parliament's BIS committee looking into the Hargreaves Report on intellectual property, it seems to be a good time to re-examine the issues at stake. Here is what happened since March on the copyright regulation front.

- In April, **the high court rejected** the UK's Internet service providers BT and TalkTalk's challenge to the DEA.
- In May, Professor Hargreaves released his review of intellectual property and growth commissioned by the Prime Minister. Titled **Digital Opportunity**, the report contends that the UK's intellectual property framework falls short of what is needed.
- In June, the court refused **BT and TalkTalk's application** to appeal the high court's April decision.
- In July, the high court ordered **BT to block its customer's access** to a file-sharing website Newzbin2 on the request of the Motion Picture Association.
- In August, as part of the **government's response** to the Hargreaves report, business secretary Vincent Cable said that plans to block illegal file-sharing websites under the DEA are probably unworkable.

In our policy brief we said that the DEA got the balance wrong between the interest of corporate copyright holders and of citizens and the economy as a whole. We said that there is a need to move away from disproportionate protection for the incumbents in the creative industries and that public debate needs to reflect this. Our view was echoed in the Hargreaves report, which refers to the spread of digital technologies as an "opportunity" rather than a threat to the creative industries. The question is how to seize the opportunity to stimulate economic growth.

Hargreaves' report calls for evidence-based policy making, which **some readers** have found "staggeringly refreshing" because independently produced empirical evidence might counter the lobbying power of partisan stakeholders. The outcome of the **DEA judicial review**, however, illustrates the limitations of this. The Judge acknowledged the disproportionality of the DEA and the potential chilling effects of repressive measures to curb P2P file-sharing. But he concluded there was insufficient evidence to evaluate the magnitude of any negative impact. The evidence game is never going to be played on a level field: opponents of the DEA would have to provide counterfactual evidence about the future, whereas DEA supporters already have a long list of studies about the present and past of their industries?

In the case of P2P file-sharing and its legal and infringing uses, the stakeholders including citizens, consumers, ISPs, and small businesses do not have empirical data to reveal the *likely* detrimental impact of the DEA measures. The data available are on 1) the widespread practices of file-sharing and 2) the changing market conditions faced by the creative industries. The creative industry incumbents and academics they deploy interpret these data in a way that favours the conclusion that striking harshly on file sharing is the best means to breathe new life into these firms and encourage their contribution to revitalizing the digital economy. From this perspective, the call for evidence-based policy making is likely to result in a conservative analysis rather than in a progressive move to adapt the copyright law to better reflect today's realities.

In the Executive Summary and the section on enforcement of the Hargreaves report, there is a clear message that taking draconian measures to enforce IP protection is not the right way forward. But when it comes to the DEA, it is suggested that the measures that allow monitoring of the online activities of ISP subscribers should be implemented so long as their impact is "carefully monitored". This is seen as the only way to generate hard evidence that could support the argument to rescind these measures. In fact, there are other ways to find evidence and there already is some out there that suggests good reasons for providing incentives for the creative

industry incumbents to move quickly to introduce new open access business models and to generate their profits in new ways – without needing to promote repressive measures that disproportionately impact on citizens' creative uses of the online world.

The Hargreaves report also recommends a cross sector Digital Copyright Exchange, a “one-stop shop” for anyone who wants to acquire a license for using copyrighted works. An exchange could help to expand the market for legal digital online content and foster a conducive environment for technological and business innovation, which we advocated in our policy brief. In the face of the creative industries' lobbying power (the DEA win being a clear manifestation of their influence and the court decision on Newzbin2 being another), most new online services have to fight an uphill battle against the incumbents when they try to negotiate licensing terms (e.g., this is a reason for the delay in making Spotify digital music service available in the U.S. market) and the citizens' voice is almost completely absent in the policy making process. If a new Digital Copyright Exchange is launched this will be step in the right direction, but it will need strong political will and leadership to achieve.

In the meantime, if the ISPs do start monitoring their subscribers' online activities and court cases start to be brought by the copyright holders leading to subscriber's Internet access being curtailed or suspended, we can expect a media frenzy about the injustice of it all. This could result in a eventual reversal of the DEA provisions by the government, based not on evidence but on the common sense observation that at stake are more than just the interests of those currently holding copyrights. In the meantime, much damage may be done to the prospects of stimulating the creative industries in the UK in a way that is likely to maximise the economic benefits for all.

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